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Supreme Court, U.S.
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No. 02-346

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *and* COLIN DARLING,

Petitioners,

v.

LOWE EXCAVATING CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF IN OPPOSITION TO THE PETITION

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IN THE
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OCTOBER TERM, 2002

No. 02-346

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Lowe Excavating Co. ("Lowe"), submits its Opposition to the Petition for Writ of Certiorari filed by the Petitioners ("Union") to review the judgment of the Illinois Appellate Court Second District. For the reasons set forth herein, this *second* Petition for review in this case should be denied because there are no compelling reasons for supervisory review.[1]

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COUNTERSTATEMENT OF THE CASE

Petitioners attempted to secure the organization of Lowe through Lowe's voluntary access to employees in the Fall of 1987. App. 4.[2] At trial, Business Agent Colin Darling testified that his only evidence that Lowe was not paying prevailing wages and benefits in 1988 "was just

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[1] *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (App. 2d Dist. 1989), *Ill. app. denied*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989), *cert. denied, 493 U.S. 975 (1989), further proceedings, Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 169 L.R.R.M. (BNA) 2301 (App. 2d Dist. 2002), *Ill. app. denied*, App. 58 (June 21, 2002).

[2] "R-x" references are to the Trial Court Record. "C-x" are to the Legal Record of the case. "App. x" are to the Appendix accompanying the Petition.

hearsay from a couple of his employees" he obtained in the summer of 1987. R-555.

In late 1987, the developer FAMCO secured a building permit for a nursing home at Canterbury Place in McHenry Country, Illinois, which was called Ballashire Hall. R-870. Ballashire Hall was a federally funded construction project of the federal Housing and Urban Development Agency ("HUD"). R-871.

Lowe had worked for FAMCO for approximately ten years when the Ballashire Hall project arose.

HUD contracts require employers on financed projects to pay employees the prevailing area wage in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5, implementing regulations at 29 C.F.R. §5 *et seq.*, and specific prevailing area wages and benefits established by the United States Secretary of Labor.

On Monday February 15, 1988, the Union began picketing Lowe at Ballashire Hall with signs stating: "LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA." C-741.

Soon after the signs were posted, Petitioner Darling was approached by Mr. Bradley Brei, President of FAMCO at the entrance to the project. Mr. Brei told Mr. Darling "that I had already filed certified payrolls with HUD that Lowe Excavating was paying prevailing wage rates and I could not understand on what the basis was that he was there or why the pickets were there." R-879 ll.10-15. Brei also asked Darling "how can you picket on a basis that he's not paying prevailing wage rates when they've been certified." R-907 ll.15-18. Mr. Darling did not respond to Mr. Brei's question. R-879. Instead, Mr.

Darling's response to Brei was for Brei to read the sign. R-567.

At trial, Mr. Darling did not deny that Brei had told him that Ballashire Hall was a prevailing wage jobsite and that Lowe was paying prevailing wage rate. In fact, the Union knew what Lowe's wages and benefits were before the publications began. R-001171 ll.15-17.

As a result of the conversation, Mr. Brei called Marshall Lowe and asked him what was happening, because the union was "saying you're not paying prevailing wages." R-888. Mr. Brei ordered Lowe to remove his people from the site. R-882-83.

Lowe was called back to the Ballashire Hall project in the summer of 1988 by FAMCO to finish grading. The Union reestablished pickets at Ballashire Hall in September 1988. R-591.

Darling knew that Lowe was working on the federal part of Canterbury place at that time. R-586. He used the same signs to claim that Lowe was not paying prevailing wages and benefits as in February 1988.

Brei's reaction to the renewed statements was "frustration, disgust with Local 150, frustration with Marshall that he didn't get his house in order or whatever had to be done in order to continue to work." R-895. Mr. Lowe again told Mr. Brei in September 1988 that his company was indeed paying the prevailing wage and "health and welfare that was beyond the prevailing wage." R-1210 ll.9-12. However, Brei was fed up, R-1210, 1234-35, and "visibly upset," R-1237. Brei was to "the breaking point," because he was signing the HUD certifications. R-1235-36.

Brei removed Lowe from Ballashire Hall again. R-895. Brei obtained a union contractor to take over Lowe's work. R-895, 921 ll.18-20.

On March 22, 1988, Lowe's employees elected the Congress of Industrial Unions ("CIU") as their bargaining representative. App. 25. On March 30, 1988, the Board certified the CIU as the collective bargaining agent for these employees. Local 150 chose not to participate in the election.

On August 15, 1988, Lowe entered into a collective-bargaining agreement with the CIU which required payment of wages and benefits greater than prevailing in McHenry County, and made retroactive to April 15, 1988. R-681; Pl. Ex. 61 p.5¶4. The Petition's assertion at 4 that the CIU delivers four page contracts to employers to sign misstates the record in the case and is not a fact in evidence in this case.

Lowe's expert witness Frank Stampler, CPA, of the CPA firm Frank W. Stampler & Company, audited Lowe's wages and benefits with two other CPAs for the period January 13, 1988, to February 16, 1988, at Ballashire Hall, and for two other periods in 1988. From January 1 to May 20, 1988, Mr. Stampler's audit shows that all Lowe's operators received over the prevailing rate for this period. R-1097 ll.16-22.[3]

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[3]The Union alleges that it's "audit" revealed that Lowe's wages were not the same as the Union's. But, that "audit" only compared Lowe's wages and benefits to the Union's contract. Furthermore, the allegations that the United States Department of Labor required a specific apprenticeship ratio was never alleged by the Union as the basis for its signs and was never proven as applicable to Ballashire Hall. The Department of Labor approved Lowe's apprenticeship plan retroactively, Pl. Ex. 54, and never disputed Lowe's certified

(continued...)

Lowe did not work with Brei or FAMCO again for another six years. R-1240.

On February 17, 1988, Lowe filed its complaint for temporary restraining order, preliminary and permanent injunctive relief and for damages in state court. Lowe attached a copy of its certified payroll for the Canterbury Place job to the complaint. App. D ¶ 16. The next day, the union removed the case to the federal district court in Chicago, Illinois, alleging, among other things, that Lowe's complaint was preempted by federal law. The district court disagreed, "because Lowe's complaint does not on its face contain a federal claim" and remanded the case back to state court. Local 150 *did not* appeal this ruling. App. 26.

On October 11, 1988, the trial court granted Lowe's motion for a temporary restraining order, prohibiting the Union from "picketing or otherwise disseminating the fact that Lowe is non-union." C-210. Simultaneously, the trial court denied "Respondent's request for preliminary injunctive relief from alleged picketing, with knowingly false placards relating to area standards, in reckless disregard for the truth is denied, based on federal preemption grounds." *Id.*

Lowe appealed and the Illinois Appellate Court reversed. App. 24. Petitioners filed a request with the Illinois Supreme Court for leave to appeal, but the request was denied on June 1, 1989. *International Union of Operating Engrs., Local 150 v. Lowe Excavating Co.*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989). This Court denied the Union's Petition for Writ of Certiorari on November 27, 1989. *International Union of Operating Engrs., Local*

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[3](...continued)
payrolls.

150 v. Lowe Excavating Co., 493 U.S. 975 (1989). Discovery ensued.

Trial commenced in April and June 2000. The Appellate Court's final decision issued on February 22, 2002. App. 1.

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REASONS WHY THE WRIT SHOULD BE DENIED

A. The Appellate Court's Ruling on the Interpretation of Defamation *Per Quod* is in Accord with Longstanding Caselaw, Supreme Court Precedent, and National Labor Policy

The Petitioners renew their claim made in 1989 to this Court that the decision below conflicts with other decisions of this Court. Noticeably, the arguments listed today as Arguments I & II in the current Petition are the verbatim arguments made to this Court on pages 7-17 in the Union's first Petition to this Court in this case on September 1, 1989 (Case No. 89-377). Those arguments, and the first Question for Review presented to the Court today, should be denied review for the same reasons the Court denied review in 1989.

There are no surprises in the analysis made by the Appellate Court below. Careful review of the cases cited by the Union as creating a conflict were discussed at length by the court below. That court plainly considered and relied upon this Court's decisions in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); and *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977). The decision below does not create or sustain a conflict in the circuits or in any state court.

Not only did the Appellate Court recognize that the matter of area standards was an issue for the Labor Board, App. 35, but it also recognized that the Illinois courts have clearly established that its citizens have the right to be free from malicious defamation and the right is firmly rooted in Illinois policy. App. 35.

The affirmative language of this Court in *Linn*, 383 U.S. at 61, 63 (1966), establishes that, "Malicious libel enjoys no constitutional protection in any context....In such case, the one issuing such material forfeits the protection under the Act."

> Nor should the fact that defamation arises during a *labor dispute* give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice . . . [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. *The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function.*

Id. at 63 (emphasis added).

The Union's claim that the Labor Board's jurisdiction is at risk when the Union engages in area standards picketing misreads *Linn*. Moreover, the Union's "area standards" is not the defamatory matter at issue. The Union never raised the question before the Labor Board with a timely charge. Consequently, the assertion that the Labor Board's jurisdiction preempts a malicious libel case is speculative, especially when this Court stated in *Linn* that Board jurisdiction is not exclusive in these situations.

The Petitioners demonstrated no cases to the court below or in the Petition that the Board would find action-

able union defamation under §8(b)(4)(ii), 29 U.S.C. §158(b)(4)(ii). Nothing in the statute makes it an unfair labor practice for a union to engage in defamatory activities with actual knowledge or in reckless disregard of the truth or that those activities independently are coercive actions proscribed by the Act. The provisos to §8(b) presume that the truth will be published, but provide no remedy when it is not.[4]

Rather than rejecting the Union's claim that labor law questions must be carefully considered, each of the Petitioners' arguments concerning federal preemption under *Garmon* were reviewed by the court below. The argument was also in issue at the time of the Union's removal petition to the federal court. Petitioners' arguments of Board preemption could have been made to the Seventh Circuit in an appeal of the district court's ruling in 1988, but were not. App. 26. The Union waived this opportunity.

Moreover, the appellate court below specifically recognized the federal concern raised by the Union and agreed that "the activity in question is 'arguably protected' by the Act." App. 31. What was determinative to the Appellate Court, was this Court's ruling in *Linn* that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits

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[4]29 U.S.C. §158(b)(4)(i)(ii)(D), states in relevant part:
"Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public...."
29 U.S.C. §8(b)(7)(C), states in relevant part:
"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public...."

within the exception specifically carved out in *Garmon*." *Linn*, 383 U.S. at 62". App. 32-33.

In *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), the Court demonstrated that activity arguably within section 7 or 8 of the NLRA is preempted, but that "compelling state interests" were not overridden. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court applied the concept to uphold a state court injunction which precluded the union's tortious picketing activity. Although the Court thought the conduct "was arguably prohibited and arguably protected by federal law," it was permissible for the state court to restrain the location of the picketing. *Id.* at 198.

The Petitioners seek to make more of this case than can be attributed to it. It claims the existence for the first time that the Labor Board might look into labor costs in assessing a union's violation of the Board's "area standards" doctrine. Pet at 14. However, this argument was not raised to the Appellate Court or decided.

None of the Petitioners' cited cases at 13-17 involve issues of untruthful or reckless picketing. In fact, the issue in those Board cases was whether area standards picketing by itself implicitly contains an unlawful "object" and therefore should be illegal per se.

In *Local 107, Int'l Hod-Carriers (Texarkana Constr. Co.)*, 138 N.L.R.B. 102 (1962), two Board Members, Rogers and Leedom, dissented because the Board found area standards picketing not of itself to contain an unlawful object. Ten years later, in *Delivery Drivers Local 296 (Alpha Beta Markets, Inc.)*, 205 N.L.R.B. 462 (1973), the Board specifically stated that whether or not area standards picketing should be illegal *per se* under the Act is best left to Congress.

Consequently, the Board will only find area standards picketing to be a pretext for organizational or secondary purposes where there is an admission or a violation of the Board's *Moore Drydock Co.*, 92 N.L.R.B. 547 (1950), standards. The mere fact of defamatory picketing does not substitute for the Board's burden of proof to show an illegal object. And if Lowe's complaint here violated some union right, the union could have been expected to timely file its own unfair labor practice charge, which it did not.[3]

The Appellate Court correctly proceeded to hold that the Petitioner's argument that union publication of untruths involving area standards are no different from the publication of other untruths. Petitioners provided "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis." App. 33. The court below also made the correct determination that the matter at issue is not whether Lowe in fact "paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." App. 35. Hence, area standards were not ever before the state court for resolution.

The state court in defamation actions will also not be injecting itself into the "merits of a labor controversy," *Linn*, 383 U.S. at 64, because redress of "defamation actions preserved in *Linn*...can be adjudged without regard to the merits of the underlying labor controversy." *Farmer*, 430 U.S. at 299-300. The Illinois Appellate Court's precise formulation coincides with this analysis, that "[t]he issue is whether defendant, with actual malice,

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[3] "[I]t may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice." *Linn*, 383 U.S. at 66.

published a statement with knowledge of its falsity, or in reckless disregard for the truth." App. 35. And it did so by applying the high standard of defamation *per quod*. App. 15. This is the same limitation set out in *Linn* to "guard[] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned in the Act." 383 U.S. at 65.

There is nothing the state court could decide in this case that will upset the balance in the law since truthfulness does not directly concern the Board's supervisory mission. Even if the state court concludes the truthfulness question erroneously, *see Sears, supra*, since truth is only a collateral issue to finding an "object" required for intervention of the Board under §8, the balance will not be upset.

Moreover, the Appellate Court did not interpret any union contract as part of its analysis as the Union alleges at Pet. 17. As the Appellate Court found, the "facts were uncontroverted" that Lowe paid prevailing wages and benefits "as required by federal law to its employees." App. 16. The state court did not interpret and compare the Union's contract to Lowe for purposes of evaluating the Union's defamation.

The issues are plainly not ones to be entertained by the Board within its unfair labor practice jurisdiction. The only reason the issue is important to Petitioners is because they view the Act as permitting picketing with impunity in order to pressure non-signatory employers with the signal effect of causing work stoppages because the Board will never impose a remedy for the employer. Under the Union's theory, an employer will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. *Linn, supra*, at 63.

These cases cited above demonstrate the approach to preemption is not rigid under *Garmon*, but flexible. *Sears*, 436 U.S. at 188 n.13. Accordingly, there is no fundamental federal policy or caselaw conflict to be reconciled by granting the writ.

B. THE APPELLATE COURT APPLIED THE CORRECT RULE OF LAW ON ACTUAL MALICE TO THE FACTS

The Petition argues that the lower court failed to properly apply the standard of "actual malice" required in defamation cases. The decision reveals the contrary. Yet, in this factually intensive review that Petitioners wish this Court to undertake, the appellate court correctly decided that Lowe met the tripartite test in *Linn* by showing that the Union's publications were false, were made with knowledge of their falsity, and Lowe was actually harmed. 383 U.S. at 65.

The Petitioners fail to recognize that what they describe as the "negligence standard" asserted as error applied below, is derived from this Court's own libel caselaw. First, the inquiry whether the publisher of the alleged libel published in reckless disregard for the truth is not dependent on the publisher's belief:

> The finder of fact must determine whether the publication was indeed made in good faith. *Professions of good faith will be unlikely to prove persuasive*, for example, where a story is fabricated by the defendant, is the product of his imagination, or is *based wholly on an unverified* anonymous telephone call. Nor will they be likely to prevail when the publisher's *allegations are so inherently improbable* that only a reckless man would have put them in circulation.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (emphasis added).

In the present case, the appellate court found that Mr. Darling's reliance on an interview with two of Lowe's employees in the summer of 1987 at a different jobsite was improbable. Furthermore, recklessness was demonstrated by Mr. Darling's refusal to acknowledge FAMCO President Bradley Brei's statements to him that Lowe and FAMCO submitted certified payrolls to the federal government that Lowe paid prevailing wages since "it was a HUD job and prevailing wages were certified and I couldn't understand why the pickets were there and why they were stating that." R-884.

That the Union and Mr. Darling have a preferred interpretation of the Court's caselaw, is not a basis for granting the writ when it is based on the refusal to acknowledge that this information would make the publications defamatory. In this case, the "facts were uncontroverted." App. 16. Mr. Darling did not respond to Mr. Brei's question how he could make the claims stated on the sign, R-879, or state any support for his claims at that time. According to Darling, his only response to Brei was to tell Brei to read the sign, R-567, and did not respond to the question.

The Petitioners reason that the Appellate Court below "improperly stated that Local 150 'should have at least entertained serious doubts as to the truth of the statements contained on the picket signs,'" allegedly suggests what the defendants knew or should have known. Pet. 21. This argument was not fully briefed to the Appellate Court or reached. Yet, the argument fails to comprehend that the court found the Union's assertions were not uttered in good faith and that upon receipt of knowledge that Ballashire Hall was a federal project, the Petitioners did not pause to reconsider their improbable claims.

In the instant case, Darling actually knew on the morning of February 15, 1988, that the Union claim that "Lowe Excavating Does Not Pay the Prevailing Wages and Economic Benefits" was publicized on a federal Davis-Bacon Act project where prevailing wages and economic benefits were mandated by federal law (or be convicted of a felony under the Anti-Kickback Acts, 18 U.S.C. § 874 & 41 U.S.C. § 54).

The appellate court's determination is a fair interpretation of this Court's precedents. Lowe demonstrated by clear and convincing evidence that Darling and the Union were provided information that their publications were libelous, and both *continued* to absolutely refuse to acknowledge the defamatory nature of their publications.

Further, the Petitioners claim that the reckless disregard for the truth or "actual malice" standard does not equate with entertaining serious doubt about what is being published is erroneous Pet. at 21. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), this Court explained serious doubt is part of the standard: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Here, Darling was told specifically that his statement was incorrect and why it was incorrect. He refused to acknowledge the information and authorized continued publications. The Court below was well within its authority to find that the Union's refusal to consider new information provided to it along with the Union's secret rules regarding "audit" evidence (such that it would never consider an employer's own submission of evidence and the Union would never tell an employer that the Union would only consider a Union auditor's report, App. 6), established action in reckless disregard for the truth.

Instead, the Union continues to allege that it "received no hard evidence in response" to its picketing. Pet. at 23. The record shows it received evidence that facts it

continued to utter were reckless; Illinois law requires that it "should...recognize the likelihood that some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance." 28 Restatement (Second) of Torts § 623A comment b at 336 (loss of privilege).

The facts arising in this case are unique. The courts of Illinois have been exceedingly careful not to permit defamation awards unless this Court's high standards have been met. *Wanless v. Rothballer*, 115 Ill.2d 158, 503 N.E.2d 316 (1986); *Pease v. Operating Engrs., Local 150*, 576 N.E.2d 614 (App. 2d Dist. 1991). "'Reckless disregard' means 'proceeding to publish the defamatory matter despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." *Mittelman v. Witous*, 135 Ill. 2d 220, 237-38, 552 N.E.2d 973 (1989).

The cases cited in the Petition at 22, such as the age discrimination case of *Brown v. M&M/Mars*, 883 F.3d 505 (7th Cir. 1989) (ADEA case-no libel asserted), do not support the Petitioners' claim. *Martin v. State Journal-Register*, 244 Ill. App.3d 955, 612 N.E.2d 1357 (4th Dist. 1993), however, demonstrates that Illinois courts are well aware of the serious considerations needed to confirm a defamation award. Here, the finding of actual malice was based upon multiple considerations. App. 17.

This case turns on its own facts. Nothing the Petitioners have argued to denigrate the "uncontroverted" facts affirmed by the appellate court is persuasive.

The interests of state and federal policy were carefully considered by the appellate court and are completely in balance with these policies in this case. Further, the narrow grounds on which the decision was decided are not important enough to warrant this Court's review.

♦

CONCLUSION

For the reasons set out above, the Court should deny Petitioners' request for a writ of certiorari to the Appellate Court of Illinois, Second Judicial District.

Respectfully submitted,

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